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Accubuilt, Inc. and International Union, United Automobile, Aerospace, Agricultural Implement Workers of America, AFL-CIO. Case 8-RC-16511

December 31, 2003

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

The National Labor Relations Board has considered objections to an election held April 17, 2003,¹ and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The final tally of ballots shows 78 for and 74 against the Petitioner.²

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations, and finds that a certification of representative should be issued.

The Employer objected to the election results, arguing, inter alia, that several prounion employees made election-related threats against coworkers during the election campaign.³ The hearing officer overruled the objections. He found that employees had made four threats, but concluded that these incidents, which potentially affected only three employees and were not disseminated to any additional bargaining-unit employees, were insufficient, either separately or in the aggregate, to warrant setting aside the election. The Employer contends that, given the close electoral margin, these four incidents require us to set aside the election. We affirm the hearing officer.

Under longstanding precedent, the Board will set aside an election because of the conduct of third parties if the conduct creates a general atmosphere of fear and reprisal that renders a fair election impossible. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). In determining whether a threat is serious and likely to intimidate prospective voters to cast their ballots in a particular manner,

the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was "rejuvenated" at or near the time of the election.

Id. (Citations omitted.)

Although the Board will pay particular attention to the fairness of close elections, see, e.g., *Robert Orr-Sysco Food Services*, 338 NLRB No. 74 (2002), the *Westwood Horizons* standard applies even where the election margin is narrow.⁴ See *Corner Furniture*, 339 NLRB No. 146, slip op. at 2 (2003). Thus, in accordance with precedent, we assess whether a general atmosphere of fear and reprisal existed in the Employer's plant, rather than merely comparing the number of employees subject to any sort of threats against the vote margin. We find that the four alleged threats here, known to no more than three employees in a unit of over 150, did not create a general atmosphere of fear and reprisal.

1. First, the hearing officer found that employee Jarrod Satterfield made an allegedly threatening statement to his coworker Tony Russo sometime in March (which was not clearly within the critical period). This statement occurred in the context of a discussion about the pros and cons of unionization, after Russo expressed concern about being part of the election campaign because of his probationary status as a new employee. Satterfield, whom Russo believed to be a union adherent,⁵ told Russo that "if [he] wasn't for them [he] was against them." Satterfield then pointed at prounion employee Angela Truesdale-Martin and said, "All she has to do is file sexual harassment charges against you and you will be fired."

The hearing officer properly found Satterfield's statements not to be threatening. The statement regarding sexual harassment charges and Russo's discharge was hypothetical on its face, and the context in which Satterfield made the statement raises a serious question whether it was a threat at all. Read in context, it appears equally likely that Satterfield was merely reminding

¹ All dates are in 2003, unless otherwise indicated.

² The initial tally of ballots showed 75 for and 74 against the Petitioner, with 3 challenged ballots, a sufficient number to affect the results. The three challenged ballots were opened and counted, as ordered by the Regional Director, and they are not at issue in this decision.

³ The Employer does not except to the hearing officer's conclusion that none of the conduct it has raised before the Board can be attributed to the Union or its agents.

⁴ *Robert Orr* and the cases it cites are distinguishable on their facts from the present case, based on the factors set out in the *Westwood Horizons* test. They involved threats that were more serious, occurred closer to the election, were disseminated more widely, and/or were accompanied by physically threatening conduct.

⁵ Satterfield, however, testified that he ultimately voted against the Union.

Russo that, as a probationary employee, he lacked job security regardless of the union campaign or his involvement in it. Moreover, Satterfield did not threaten to do anything himself to Russo. Rather, he predicted a chain of events that was clearly beyond his control, depending, as it did, both on the willingness of another employee (who was not involved in the conversation or otherwise aware of Satterfield's statement) to file false charges and on the response of the Employer if such charges were actually filed. The Board has held generally that threats of job loss for not supporting the union, made by one rank-and-file employee to another, are not objectionable, and that such statements can be readily evaluated by employees as being beyond the control of the employees and the union. See *Duralam, Inc.*, 284 NLRB 1419 fn. 2 (1987), and cases cited therein.

Here, Satterfield's alleged threat of harassment charges was similarly contingent and remote. Even setting aside speculation about the Employer's response and focusing on the potential risk to Russo's reputation, the supposed threat remained dependent on misconduct by another employee, whose willingness to commit such misconduct has not even been implied, let alone demonstrated. Satterfield's statements were directed at only one employee, were not disseminated to other unit members, were made at least 2-1/2 weeks (and possibly as long as 6-1/2 weeks) before the election, and were not repeated or otherwise rejuvenated near the time of the election. These factors support a finding that Satterfield's statements were not sufficiently serious to be objectionable.

Finally, Russo's testimony that this event occurred "sometime in March" leaves open the possibility that this event may have occurred before the critical period began on March 7. It is the objecting party's burden to demonstrate that objectionable conduct occurred during the critical period. See, e.g., *Gibraltar Steel Corp.*, 323 NLRB 601, 603 (1997). The uncertainty whether Satterfield's remarks occurred during the critical period provides a separate basis for overruling this objection.

2. Second, the hearing officer found that prounion employee Joseph Geddings told antiunion employee Eric Greene that voting against the Union would be a good way to get his fingers broken. Geddings is approximately 6 inches taller than Greene, but there is no evidence that Geddings accompanied his statement with any physical conduct or had any history of violence. The hearing officer properly found that the threat was directed only at Greene and was not disseminated to other employees, was isolated, was distant in time from the election, and was not rejuvenated near the time of the election.

Moreover, Greene testified variously: that Geddings' threat occurred "somewhere towards, towards the end, the halfway point probably"; that it occurred a month and a half or two months before the April 17 election; and that it may have occurred days, but not weeks, before March 12. Without making specific findings as to the threat's timing, the hearing officer recognized that it could have occurred before the critical period began on March 7. While the hearing officer overruled this objection based on factors other than the possibility that the incident occurred outside the critical period, we find the ambiguity of the event's timing dispositive. Because Greene could not specify when Geddings threatened him, and because his testimony indicates that it may have been outside the critical period, the Employer has not met its burden with respect to this incident. See *Allis-Chalmers Corp.*, 278 NLRB 561, 563 (1986). Thus, we find that this conduct is not objectionable.

3. Finally, the hearing officer considered evidence that antiunion employee Nathan Eversole was the object of two alleged threats. First, perhaps a few weeks before the election, employees Darrin Sevitz and Dean Rex stated that if Eversole wanted to keep his new car looking the way it did, he needed to vote yes in the election. Eversole then purchased a less expensive car from his sister and drove that car to work most (but not all) days for the remainder of the campaign. The hearing officer found that Sevitz' and Rex's remarks, as generalized verbal threats made by third parties, represented overzealous partisanship rather than meaningful threats. *American Wholesalers, Inc.*, 218 NLRB 292 (1975), enf'd. 546 F.2d 574 (4th Cir. 1976). As was true in *American Wholesalers*, here there was no actual physical violence, and the threats occurred in a large bargaining unit. Because the statements about Eversole's car were directed only to him and were not disseminated, we agree with the hearing officer that they did not create a general atmosphere of fear and reprisal.

The second threat against Eversole occurred at a union meeting the night before the election, when employees Angela Truesdale-Martin and Camilla Irons told Eversole that since he was voting no in the election, they were "going to get [him] back." This statement was so vague that even Eversole himself did not understand what it threatened. Nor was the threat made or disseminated to any other employees. Board precedent is clear that statements like this by nonparty coworkers are not objectionable. *Cal-West Periodicals, Inc.*, 330 NLRB 599 (2000).

4. Because the evidence establishes only one alleged critical-period threat, there is no cumulative effect to consider. The alleged threat against Eversole was insuf-

ficient to create a general atmosphere of fear and reprisal that interfered with the election. Accordingly, we decline to set aside the election.⁶

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Union, United Automobile, Aerospace, Agricultural Implement Workers of America, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time production and maintenance employees at the Employer's 2550 Central Point Parkway facility,

⁶ Chairman Battista and Member Schaumber would set aside an election in circumstances where the "critical period" conduct of the third party affected a determinative number of voters, even if that conduct did not "create a general atmosphere of fear and reprisal." In the instant case, the "critical period" conduct affected only one employee. The election was decided by a four-vote margin. Thus, Chairman Battista and Member Schaumber concur in the result.

but excluding all office clerical employees, technical employees, professional employees, guards, and supervisors as defined in the Act.

Dated, Washington, D.C. December 31, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD